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IN THE

Supreme Court of the United States

October Term, 1960

No. 902

MOHEGAN INTERNATIONAL CORPORATION,
Appellant,

against

THE CITY OF NEW YORK, LAWRENCE E. GEROSA, Comptroller of the City of New York, HILDA G. SCHWARTZ, Treasurer of the City of New York, and JOSEPH E. KEEGAN, Collector of the City of New York,

Appellees.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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Preliminary Statement

By motion, dated May 5, 1961, appellees have moved to dismiss the within appeal on the ground that it does not present a substantial federal question. In this brief appellant will reply to the points and sub-points urged by appellees in the order contained in the motion to dismiss.

APPELLANT'S REPLY TO POINT I OF MOTION TO DISMISS

In this point heading appellees contend that the Commerce Clause does not bar the tax on appellant's receipts as a foreign freight forwarder since it services "are performed within the City of New York and are local in nature" (Motion, p. 10).

That the appellant's services are not "local in nature" has been dealt with under Point I of the Statement as to Jurisdiction to which the Court is respectfully referred. Appellees' other contention that the tax is not barred because the services are performed within the City of New York is novel and wholly contrary to the decided cases.

There are many services in transportation performed entirely within a port area which have been held to be in interstate and foreign commerce and thereby exempt from a local privilege tax. These services include those of a passenger agent for a railroad (*McCall* v. *California*, 136 U. S. 104 (1890)); a steamship agent for an ocean carrier (*Texas Transport and Terminal Co., Inc.* v. *City of New Orleans*, 264 U. S. 150 (1924); *Gdynia America Line, Inc.* v. *Taylor*, 250 App. Div. 105, 293 N. Y. S. 613 (1937)); stevedoring (*Joseph* v. *Carter & Weeks Company*, 330 U. S. 422 (1947)); marine terminal operations (*Port of Port Angeles, et al.* v. *Henneford, et al.*, 193 Wash. 29, 74 P. (2d) 1025 (1938)); and river piloting (*Seeth* v. *Joseph*, 276 App. Div. 188, 93 N. Y. S. 2d 591 (1949)). In addition, appellees have acknowledged that domestic forwarders are exempt from the city tax (Pl.'s Ex. 2, R. 206), even though their consolidation activities take place within the City of New York. Further, appellees have conceded that the gross revenue of appellant from carriers as a freight broker is exempt, even though all of its services are performed locally and indeed by the same personnel performing the forwarding services (R. 82-83, fols. 246-249).

Reply to Sub-Point (1)

Appellees note (p. 10) that appellant has described its ocean freight forwarding services as the "arranging for the movement of export cargo" and "forwarding of cargo" and then point out that the Court of Appeals "properly" termed this description "a little overstatement" (see Juris. St., App. A, p. 22).

It is difficult to understand why appellees object to this description when it is substantially no different than their statement on page 17 of their motion that "All of the present appellant's *forwarding services* are performed in connection with bringing exports to the port and to the water's edge." It is strange too that the Court of Appeals should take exception to the description "forwarding of cargo" when appellant has been held to be "carrying on *the business of forwarding* * * * in connection with a common carrier by water" under the U. S. Shipping Act, 1916, as amended (46 U. S. C. § 801, *et seq.*), *U. S.* v. *American Union Transport, Inc., et al.*, 327 U. S. 437 (1946). In that case this Court stated:

> "There is little or no dispute as to the nature of their business. They are primarily *forwarders of freight*, as that term is generally understood, for trans-shipment in foreign commerce." (*Id.* at p. 442, emphasis supplied)

The exception to appellant's description appears to be based upon an unwillingness by both appellees and the Court below to recognize that the "forwarding of cargo" is a distinct function and just as important to the transportation as the consolidation, carriage or loading of the freight.

Reply to Sub-Point (2)

Under this sub-point appellees insist that this Court sustained the tax in the *Canton Railroad* case under the Commerce Clause and they note that in the opinion therein reference was made to the railroad's objection "on the ground that interstate commerce is involved" and that the railroad argued the Commerce Clause in its main and reply brief (Motion, p. 12).

Obviously, a belated argument by the railroad of the Commerce Clause in its brief before this Court does not mean that its decision was based thereon. As noted in the

Statement as to Jurisdiction (p. 13), this Court in that case and in the *Western Maryland* case made no reference to the Commerce Clause and specifically limited the issue of taxability to the Import-Export Clause (340 U. S. at pp. 512 and 520). Both the majority and minority opinions in the Court of Appeals of Maryland likewise made it clear that the only issue raised was the validity of the tax under the Import-Export Clause. 195 Md. 206, 73 A. 2d 12 (1950).

Reply to Sub-Points (3) and (4)

Appellees cite several cases (p. 12) to the effect that "analogous services" to those of appellant, even though essential to interstate commerce, have been held to be a local business subject to state taxation. None of the services in the cases cited are even remotely analogous to those rendered by appellant as a forwarder. In the *Puget Sound* case the service was that of supplying longshoremen to be hired and controlled by ocean carriers. The taxpayer in effect was acting as an employment agency for longshoremen. Appellant does not supply personnel for forwarding work to be hired by either the shipper or carrier; on the contrary, it does the work itself with its own employees. In the *Federal Compress* case the activity involved was the storing and compressing of cotton, certainly far removed from the services in the within case. The *Pennsylvania R. R. Co.* case involved the operation of a local taxicab service and *Nathan* v. *Louisiana* concerned a money broker, neither of which two activities can be considered analogous to export forwarding. The *Pekao Trading Corp.* case involved the business of soliciting orders for gift parcels, assuredly not similar to appellant's functions.

Alaska v. *Arctic Maid*, — U. S. —, decided by this Court on May 1, 1961, dealt with a tax on the prosecuting of the business of freezer ships or other floating cold storages. The Court held that the process of gathering

fish by the respondents therein, either through their own catcher boats or through independent operators, was the taxable event and a "local activity" so different than the taxes sustained by this Court for the taking of shrimp or the extraction of ore. The forwarding of export traffic across state lines into our foreign commerce is far removed from catching or buying of salmon in Alaskan waters.

Appellant argued (Juris. St., pp. 10-11) that the close regulation of its activities by the Federal Maritime Board under the U. S. Shipping Act, 1916, and the Merchant Marine Act of 1936 establishes that it is engaged in interstate and foreign commerce. In answer thereto appellees cite cases (p. 13) to the effect that a business can be subject to federal regulation and still be considered a "local activity" subject to state taxation. With one exception none of the cases cited deal with a local privilege tax. In any event, appellees misconstrue appellant's contention. It is not contended that the subjection of an activity to any type of federal regulation, no matter how minimal, *ipso facto* places that activity in interstate and foreign commerce. But the detailed and direct regulation of forwarders under federal shipping laws, being no different than the governmental control exercised over steamship lines and other transportation industries held exempt from the tax, establishes conclusively that the business must be in interstate and foreign commerce.

On page 14 and elsewhere (pp. 5, 11) appellees contend that appellant is not engaged in interstate and foreign commerce because it does not direct or control the transportation of the goods, take physical possession of them or assume any liability for loss or damage. These factors weighed with the court below in holding that appellant's forwarding activities were "a local business and are separate from such commerce" (Juris. St., App. A, pp. 22, 25).

The fact that appellant does not physically handle the goods or assume liability for transportation is completely

irrelevant to the issue as to whether it is engaged in interstate and foreign commerce. Appellees have conceded that the revenue of appellant as a freight broker is not taxable, stating that such activities are "an integral part of foreign commerce" (Pl.'s Ex. 2, fols. 270-271). Yet, as a broker appellant does not transport the goods or assume responsibility therefor. Neither does a passenger agent or a steamship agent, this being the obligation of their carrier principals. *E. I. duPont De Nemours & Co.* v. *Barge Carriers, Inc. et al.*, 55 F. Supp. 728 (1944). In the *McCall* and *Texas Transport* cases, *supra*, this Court held these agents exempt from a local privilege tax.

The two cases relating to customhouse brokers, cited by appellees on page 14, are inapposite. The services rendered by customhouse brokers on imports are not similar to those of forwarders on exports. This may be seen from a description of the work of the former contained in *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 203-204 (1944). Customhouse brokers have no relationship with ocean carriers; they are not involved in the process of coordinating the movement of goods inbound to the port area nor must they see to it, as does the forwarder, that the cargo arrives at shipside at precisely the desired time with proper documents and is loaded per schedule. The customhouse broker performs the clerical function of clearing the goods through the local customhouse and is not concerned with the movement of the cargo. Furthermore, it was emphasized by this Court that the tax sustained in the *Union Brokerage* case was, unlike the within tax, "a supervisory and not a fiscal measure" (*Id.* at p. 210).

Reply to Sub-Point (5)

In an effort to distinguish the *Texas Transport* case, *supra*, appellees note (pp. 14-15) that certain activities of the steamship agent therein are not the same as those of appellant as a forwarder. It is true that the services

are not identical, since the steamship agent is acting on behalf of a carrier and the forwarder on behalf of an exporter at the port. However, by cooperating with each other on behalf of their respective principals the steamship agent and the forwarder accomplish the exportation of the goods. The record shows that the forwarder "works hand in glove with the steamship agent" on the movement (R. 175, fol. 525). Both the carrier and its port agent as well as the exporter are exempt from a local privilege tax. Can it logically be said that the exporter's port agent, the forwarder, is any less deserving of the constitutional protection than these others?

On page 15 appellees cite the fact that the steamship agent is empowered to enter into binding contracts for a steamship company as relevant to the issue of the exemption received from the tax. Appellant as a forwarder makes binding contracts for its principal, the exporter. It makes a booking contract with the steamer, negotiates and accepts the bill of lading (the contract of carriage) and makes other contracts for the exporter with marine insurance underwriters, warehousemen and motor carriers. Appellant's power to contract for the exporter is basically no different than that of the steamship agent for the carrier.

Appellees describe as "incredible" (p. 15) appellant's contention that its services as a forwarder are the same as those of a freight broker. The uncontroverted testimony is that "In many cases, payment is for the same service. In other words, the services are of value to both the shipper and the steamship line, and payment is made by both parties for overlapping services" and that "it is difficult to draw any sharp line of distinction" when appellant is acting as a forwarder as distinguished from a broker (R. 77, fol. 231; R. 188, fol. 564). The Trial Court likewise found that services rendered to the carriers are also rendered to the exporters (R. 241, fol. 723; 17 Misc. 2d 104, 111).

The evidence herein is that the principal service rendered to the steamship line by appellant as a freight broker is getting the revenue-producing freight from the inland supply point on to the ship (R. 77, fol. 231). This is also the primary service rendered to the shipper as a forwarder (R. 78, fol. 233). In their motion appellees acknowledge the fact that "A single employee handles all aspects of a particular transaction or shipment from beginning to end" (p. 5). When this employee coordinates the movement of the cargo from supply point to shipside, the remuneration to appellant from the carrier for this service as a broker is, according to the city, exempt from the tax, but its revenue from the exporter as a forwarder for the identical service by the same employee is held subject to the tax. Such a patently incongruous conclusion, which is the effect of the decision below, cannot reasonably be sustained and merits review by this Court.

APPELLANT'S REPLY TO POINT II OF MOTION TO DISMISS

Reply to Sub-Points (1) and (2)

Appellees cite the *Canton Railroad* and *Western Maryland Railway* cases in support of the proposition that the appellant's activities as a forwarder are not immune from the city levy under the Import-Export Clause (p. 16). They assert that these cases held that the "handling of the goods" at the port prior to the water's edge is not part of the export process and that appellant's activities, therefore, in "bringing exports to the port and to the water's edge" are taxable (p. 17).

Assuming these cases are sound law,[1] appellees have not met appellant's contention that there is a clear dis-

[1] Justices Frankfurter and Jackson reserved decision after expressing "grave and what appear to be soundly based doubts" concerning these decisions. See Brown, Justice Frankfurter—The Open Economy, 67 Yale L. J. 219, 232-233.

function between the handling of goods at the port by the railroads, a purely local physical function, and appellant's services in coordinating the movement across state lines from supply point to shipside, a non-physical activity extending beyond the port area. Unless these services are judicially recognized as part of the export process, the Import-Export Clause would be rendered meaningless. "To be effective, this clause must be construed broadly enough to prevent a state from avoiding the prohibition by placing the tax burden on an indispensable activity connected with the [export]." 50 Mich. Law Review 152, 153 (1951). By taxing the indispensable function of forwarding, the city is placing a serious obstruction in the path of the federal policy against restraints upon exports.

Appellees' assertion that the forwarder's services end at the water's edge and that thereafter it "simply waits" (p. 17) for the carrier to load the goods is contrary to the undisputed evidence in the record. Appellant owes a legal duty to its shipper to make certain that the goods are actually on board the vessel (Juris. St., pp. 18-19), an activity extending beyond the water's edge.

Appellees assert under sub-point (3) that a tax on appellant's forwarding services is not in any way comparable to the taxes held invalid by this Court on bills of lading, charter parties, or marine insurance policies since appellant does not issue such documents (pp. 17-18). The test as to validity is not determined by who issues the document. The aforementioned taxes were invalidated under the Import-Export Clause because they added to the exporter's price of the goods or otherwise directly burdened the exportation. *Brown* v. *Maryland*, 12 Wheat. 419, 444 (1827); *Fairbanks* v. *U. S.*, 181 U. S. 283, 293 (1901). A tax on goods destined for export which must be absorbed in the price is a burden to the exportation, regardless of whether it is levied upon a document or service necessary to the export process. Such a tax is invalid because it

must eventually be paid by the exporter or consignee as part of the transportation cost. The gross receipts tax herein falls squarely into this category since it lays a burden on every transaction. (See *Crew Levick* v. *Penn.*, 340 U. S. 292, 297 (1917).)

Conclusion

The record herein indicates that this is a test case brought on behalf of the ocean freight forwarding industry in the City of New York. Several hundred forwarders await the answer to the question as to whether the City should be allowed to exploit its geographic position as the major American port to levy a toll on the great bulk of exports passing through its gates. Such an issue is federal and substantial and merits plenary consideration by this Court.

The motion to dismiss the appeal should, therefore, be denied.

Respectfully submitted,

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